STATE OF MICHIGAN

COURT OF APPEALS

SHANNON MARY EVANS, Plaintiff-Appellee,	UNPUBLISHED February 10, 2015
v	No. 323126 Benzie Circuit Court Family Division
ADAM DANIEL EVANS, Defendant-Appellant.	LC No. 09-008618-DM

Before: M. J. KELLY, P.J., and CAVANAGH and METER, JJ.

PER CURIAM.

Plaintiff and defendant married, had two children, and divorced. They were awarded joint legal custody of the children and plaintiff was awarded primary physical custody. A little over four years following the divorce, and after plaintiff had moved with the children several times, defendant requested that he be given primary physical custody of the children. The trial court denied his motion, finding an insufficient basis for revisiting the custody matter.[1] Defendant appeals as of right. We reverse and remand for a custody hearing.

Shortly after the parties were divorced, plaintiff married an active duty member of the United States Army. When plaintiff's new husband was transferred to Kentucky, she moved the court to change the children's domicile. Plaintiff maintained that she and her husband would be returning to Michigan in three years. The trial court granted the motion and defendant was awarded parenting time. Approximately one year later, plaintiff's husband was transferred to Georgia, and plaintiff moved with the children to Alabama, near her husband's place of employment. Plaintiff did not seek court approval for this change of domicile. Then, in 2013, plaintiff's husband was sent for one year to South Korea. Plaintiff returned to Michigan with the children and the children spent the 2013-2014 school year in Michigan. The parties had an informal agreement that allowed for increased parenting time for defendant during this period.

[1] A party seeking a change of child custody must first demonstrate by a preponderance of the evidence that there is "proper cause" or a "change of circumstances." *In re AP*, 283 Mich App 574, 600; 770 NW2d 403 (2009); MCL 722.27(1)(c).

Thereafter, defendant, *in propria persona*, moved the trial court to change custody, requesting primary physical custody. He alleged that plaintiff intended to return to Alabama once her husband returned from South Korea. Defendant contended that the frequent moves had a negative effect on the children. He also asserted that he could offer the children a better standard of living and that plaintiff was an ineffective parent who did not provide appropriate living conditions for the children, which led to a decline in the children's academic performance. Plaintiff admitted that the children were performing poorly in school, but also asserted that the children performed well in school before moving back to Michigan. Plaintiff alleged that the children had been diagnosed with psychological problems, and suggested that they performed poorly in school due to "the parties' disagreements over the treatment of their children's psychological issues."

In denying defendant's motion, the court concluded that defendant's argument that he could provide a better standard of living did not "rise to the level of a change of circumstances or proper cause." The trial court also stated that the military status of plaintiff's husband should not require plaintiff to forfeit custody. The court concluded that even accepting defendant's allegations as true, "[t]here ha[d] not been a demonstration of something more than the normal life changes, good and bad, that occur during the life of a child."

Defendant argues that the trial court erred in failing to find proper cause or a change of circumstances. "This Court reviews a trial court's determination regarding whether a party has demonstrated proper cause or a change of circumstances under the great weight of the evidence standard." *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). Under this standard, "this Court defers to the trial court's findings of fact unless the . . . findings clearly preponderate in the opposite direction." *Id*. (citations and quotation marks omitted).

A party seeking a change of child custody must first demonstrate by a preponderance of the evidence that there is "proper cause" or a "change of circumstances." *In re AP*, 283 Mich App 574, 600; 770 NW2d 403 (2009); MCL 722.27(1)(c). This is a threshold requirement that the moving party must meet before the trial court is permitted to hold an evidentiary hearing and reassess the custodial arrangement. *In re AP*, 283 Mich App 600.

In *Vodvarka v Grasmeyer*, 259 Mich App 499, 511; 675 NW2d 847 (2003), we concluded that proper cause "means one or more appropriate grounds that have or could have a significant effect on the child's life to the extent that a reevaluation of the child's custodial situation should be undertaken." The Court stated that although "[t]here is no hard or fast rule, . . . trial courts can look for guidance in the twelve factors [from MCL 722.23] developed by the Legislature for determining what is in the child's best interests." *Id*. However, the Court cautioned "that not just *any* fact relevant to the twelve factors will constitute sufficient cause. Rather, the grounds presented . . . must be of a magnitude to have a significant effect on the child's well-being to the extent that revisiting the custody order would be proper." *Id*. at 512 (emphasis in original). The Court summarized the proper cause requirement as follows:

> [T]o establish "proper cause" necessary to revisit a custody order, a movant must prove by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court. The appropriate ground(s) should be relevant to at least one of the twelve statutory best interest factors, and must be of

such magnitude to have a significant effect on the child's well-being. When a movant has demonstrated such proper cause, the trial court can then engage in a reevaluation of the statutory best interest factors. [*Id*.]

Regarding changed circumstances, the Court held that "a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed." *Id*. at 513 (emphasis in original). The Court reiterated that "not just any change will suffice," explaining, "the evidence must demonstrate something more than the normal life changes (both good and bad) that occur during the life of a child, and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child." *Id*. at 513-514. The Court held that, as with proper cause, "[t]his too will be a determination made on the basis of the facts of each case, with the relevance of the facts presented being gauged by the statutory best interest factors." *Id*. at 514.

Defendant argues that the move from Kentucky to Alabama without court approval alone constituted changed circumstances. Defendant relies on *Sehlke v Vandermaas*, 268 Mich App 262, 266; 707 NW2d 603 (2005), rev'd in part on other grounds 474 Mich 1053 (2006), where this Court held that "a move by the custodial parent in violation of MCL 722.31 constitutes a change in circumstance that authorizes the trial court to reopen the custody matter." The Court stated that "a move in violation of MCL 722.31 by itself constitutes a change of circumstances . . . ." *Id*. MCL 722.31 provides, in pertinent part:

> (1) A child whose parental custody is governed by court order has, for the purposes of this section, a legal residence with each parent. Except as otherwise provided in this section, a parent of a child whose custody is governed by court order shall not change a legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order is issued.
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> (2) A parent's change of a child's legal residence is not restricted by subsection (1) if the other parent consents to, or if the court, after complying with subsection (4), permits, the residence change. This section does not apply if the order governing the child's custody grants sole legal custody to 1 of the child's parents.
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> (3) This section does not apply if, at the time of the commencement of the action in which the custody order is issued, the child's 2 residences were more than 100 miles apart. This section does not apply if the legal residence change results in the child's 2 legal residences being closer to each other than before the change.
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> (4) Before permitting a legal residence change otherwise restricted by subsection (1), the court shall consider each of the following factors, with the child as the primary focus in the court's deliberations:

(a) Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent.

(b) The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child, and whether the parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting time schedule.

(c) The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent; and whether each parent is likely to comply with the modification.

(d) The extent to which the parent opposing the legal residence change is motivated by a desire to secure a financial advantage with respect to a support obligation.

(e) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(5) Each order determining or modifying custody or parenting time of a child shall include a provision stating the parent's agreement as to how a change in either of the child's legal residences will be handled. If such a provision is included in the order and a child's legal residence change is done in compliance with that provision, this section does not apply. If the parents do not agree on such a provision, the court shall include in the order the following provision: "A parent whose custody or parenting time of a child is governed by this order shall not change the legal residence of the child except in compliance with section 11 of the "Child Custody Act of 1970", 1970 PA 91, MCL 722.31."

Plaintiff argues that because she received permission for the move to Kentucky, she was not required to seek permission for every subsequent move. However, the statute does not state that subsequent moves, in the absence of an agreement by the parties, do not require court approval, and plaintiff provides no caselaw on this point.

MCL 722.31 applies to any move to a residence that is more than 100 miles "from the child's legal residence at the time of the commencement of the action in which the order is issued." MCL 722.31(3) provides, in pertinent part: "This section does not apply if, at the time of the commencement of the action in which the custody order is issued, the child's 2 residences were more than 100 miles apart."

It is unclear what "the commencement of the action in which the order is issued" or "the action in which the custody order is issued" means. The definition section of the Child Custody Act, MCL 722.22, provides no guidance. In determining the meaning, we seek to ascertain the intent of the Legislature. *Michigan Ed Ass'n v Secretary of State*, 489 Mich 194, 217; 801 NW2d 35 (2011). In doing so, the Court must first look to the language employed in the statute.

United States Fidelity Ins & Guaranty Co v Michigan Catastrophic Claims Ass'n (On Rehearing), 484 Mich 1, 13; 795 NW2d 101 (2009). The Court "must consider both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme." *Id*. (citations and quotation marks omitted). Dictionaries may be consulted to determine the meaning of words not defined by the Legislature. *Johnson v Pastoriza*, 491 Mich 417, 436; 818 NW2d 279 (2012).

Black's Law Dictionary (9th ed) defines "action" as "[a] civil or criminal judicial proceeding." It defines "proceeding" as "[t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment" and also defines "proceeding" as "[a]n act or step that is part of a larger action." These definitions together suggest that "action" encompasses the entirety of the divorce proceedings, not just, for example, plaintiff's motion for a change of domicile. Thus, it is correct to say that plaintiff and defendant filed motions in the underlying action and did not institute new actions by filing the motions. MCL 722.31 applied in this case because plaintiff moved from Kentucky to Alabama, which was more than 100 miles from where the children lived at the time of the commencement of the divorce action. Moreover, the exemptions in MCL 722.31(3) did not apply to the move because Alabama is farther from Michigan than Kentucky and because, at the time of the commencement of the divorce action in which the custody order was issued, the children's residences were not more than 100 miles apart.[2]

Under the precedent of *Sehlke*, in combination with the frequent moves in general (including a planned upcoming move to Louisiana), there was a change in circumstances sufficient to trigger a revisiting of the custody matter.

Reversed and remanded. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter

[2] Even if we were to construe the "action" as plaintiff's initial motion for a change of domicile, it appears that the result would not change, because at the time of this motion the children were living in Michigan.